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No. 08-640

IN THE
Supreme Court of the United States

FEDERAL INSURANCE COMPANY, *et al.*,
Petitioners,
v.
KINGDOM OF SAUDI ARABIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS HRH CROWN PRINCE SULTAN BIN ABDULAZIZ AL-SAUD, HRH PRINCE NAIF BIN ABDULAZIZ AL-SAUD, AND HRH PRINCE SALMAN BIN ABDULAZIZ AL-SAUD

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QUESTIONS PRESENTED

1. Whether a high-ranking foreign official sued in U.S. courts for acts undertaken in an official capacity in furtherance of a foreign sovereign's national and foreign policy objectives is entitled to sovereign immunity.

2. Whether a plaintiff can use the "noncommercial torts" exception to sovereign immunity in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1605(a)(5), to sue a high-ranking official of an ally of the United States on allegations that the official, acting in his official capacity, provided material support and resources for a terrorist act, when the U.S. government has not designated the ally as a state sponsor of terrorism and the plaintiff therefore cannot proceed under the FSIA's terrorism exception, *id.* §1605A.

3. Whether allegations that a foreign person donated money to a foreign charity allegedly knowing that the money would be diverted to al Qaeda represents conduct expressly aimed at the United States or U.S. residents sufficient to support the exercise of personal jurisdiction over the person.

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INTRODUCTION

Petitioners brought these damages actions against hundreds of banks, charities, government institutions, and other defendants on the theory that they all "provided financial, logistical, and other support to al Qaeda" and should therefore all be liable for the attacks of Sep-

tember 11, 2001. Pet. App. 118a. The defendants included respondents here—members of the Saudi royal family (the "Princes") who were, at all relevant times, high-ranking public officials in the Saudi government. Petitioners' claims against the Princes have now been rejected by two district courts and a unanimous panel of the Second Circuit. That every judge has come to the same conclusion should come as no surprise. The claims are without merit and would not have been permitted in any circuit.

Seeking to overcome the legal defects in their cases, petitioners play fast and loose with the facts. They assert a "close relationship" between al Qaeda and Saudi officials, citing the 9/11 Commission's report. Pet. 4-5. But they overlook the Commission's express conclusion to the contrary—even though it appears as the second half of a sentence petitioners quote. Pet. 4. There is "*no evidence*," the Commission concluded, "that the Saudi government as an institution or senior Saudi officials individually funded [al Qaeda]." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (2004) ("9/11 Report") (emphasis added).

Petitioners likewise take liberties when they characterize this suit as an action against those who "deliberately channeled resources to al Qaeda * * * knowing that al Qaeda intended to use those resources to attack the United States and its citizens." Pet. 4; see *id.* at 31. The complaints allege only that the Princes made donations to established Islamic charities that, in turn, supposedly diverted funds to al Qaeda. See, *e.g.*, C.A. App. 2007-2013. More fundamentally, petitioners ignore the district court's express findings. Acting as trier of fact for purposes of determining jurisdiction, the court "reviewed the complaints in their entirety and f[ou]nd no allegations from which it c[ould] infer that the Princes knew the

charities to which they donated were fronts for al Qaeda." Pet. App. 161a. Petitioners' allegations against the Princes lack merit and were properly dismissed.

STATEMENT

I. Background

A. The Princes

Respondents HRH Crown Prince Sultan bin Abdulaziz al-Saud ("Crown Prince Sultan"), HRH Prince Naif bin Abdulaziz al-Saud ("Prince Naif"), and HRH Prince Salman bin Abdulaziz al-Saud ("Prince Salman") are all members of the royal family of Saudi Arabia. They are also high-ranking officials in the Saudi government.

Crown Prince Sultan is Saudi Arabia's second highest-ranking official and the designated successor to the King. Pet. App. 6a. He is currently the First Deputy President of the Council of Ministers, Saudi Arabia's highest governing body. C.A. App. 1332. For the past 44 years, Crown Prince Sultan has been Saudi Arabia's Minister of Defense and Aviation. *Ibid.* He is also Chairman of the Supreme Council for Islamic Affairs, a governmental body created by King Fahd to ensure that Saudi Arabia's support of international charities is consistent with its foreign and religious policies. *Id.* at 1332-1333. The Supreme Council, however, does not police the activities of those charities; oversight is exercised through officials who head particular organizations. *Id.* at 1333.

Prince Naif has served as Saudi Arabia's Minister of Interior since 1975. Pet. App. 60a. He oversees matters relating to public security, civil defense, fire service, police, and investigative forces. *Id.* at 7a, 74a. He is also a member of the Council of Ministers. See *id.* at 60a-61a, 69a.

Prince Salman has been the Governor of Riyadh province since 1962 and is the head of respondent Saudi High Commission ("SHC"). Pet. App. 57a, 59a, 69a. SHC is an

organ of Saudi Arabia's government formed to fund relief efforts in Bosnia-Herzegovina in response to the ethnic cleansing campaign of Slobodan Milosevic. See *id.* at 3a-4a.

B. Bin Laden's Declared War Against The Saudi Government And The Princes

The relationship between the Saudi government and Osama bin Laden has been one of enmity since long before the terrorist attacks of September 11, 2001. In 1994, Saudi Arabia, acting through Prince Naif, stripped bin Laden of his Saudi citizenship and ordered his assets frozen so that they could not be used for terrorist purposes. C.A. App. 2193. Bin Laden responded by targeting the Saudi government. He "condemned the Saudi monarchy for allowing the presence of [American troops] in a land with the sites most sacred to Islam" and called for attacks in Saudi Arabia. 9/11 Report, *supra*, at 48.

Bin Laden reserved much of his venom for the Princes individually. In a 1995 Open Letter to King Fahd, he singled them out by name, labeling them the "source of the disease" in Saudi Arabia. C.A. App. 2197. In his 1996 "Declaration of War," he branded Crown Prince Sultan and Prince Naif as "traitors who implement the policy of the enemy." *Id.* at 2314.

The Saudi government attempted to bring bin Laden to justice. In a 1997 CNN interview, bin Laden acknowledged Saudi Arabia's efforts to disrupt his activities, including "several attempts to arrest or to assassinate me." C.A. App. 2341-2342. The 9/11 Commission documented Saudi diplomatic efforts to pressure the Taliban to expel bin Laden from Afghanistan. 9/11 Report, *supra*, at 115.

After thoroughly examining the Saudi government's relationship with bin Laden and al Qaeda before September 11, the 9/11 Commission concluded that the ruling monarchy knew bin Laden was an enemy and aided in

disrupting his terrorist cells. 9/11 Report, *supra*, at 115. The Commission further concluded that there is "no evidence that the Saudi government as an institution or senior Saudi officials individually funded [al Qaeda]." *Id.* at 171.

II. Proceedings Below

A. The Complaints

Petitioners seek to hold hundreds of banks, charities, governments, and individuals liable for the terrorist attacks of September 11, 2001, because, according to petitioners, they provided "financial, logistical, and other support to al Qaeda." Pet. App. 118a. Notwithstanding the open hostility between the Princes and bin Laden, petitioners claim that the Princes channeled donations to Islamic charities knowing that those funds would be transferred to finance al Qaeda.

The first of the complaints, *Burnett* v. *Al Baraka Investment & Development Corp.*, No. Civ-A-02-1616(JR), was filed in August 2002 in the District Court for the District of Columbia. That suit alleged, in essence, that the Princes and others had caused the 9/11 attacks by contributing to charities or overseeing agencies that financially supported terrorists. For example, plaintiffs alleged that Crown Prince Sultan, as Chairman of the Supreme Council, "could not have overlooked the role of the Saudi charitable entities identified herein in financing the al Qaeda terrorist organization." C.A. App. 1236-1237.

Other complaints were then filed in the District Court for the Southern District of New York. See, *e.g.*, C.A. App. 1447-1731, 1738-1756, 1788-2136. The complaints all contain substantially the same conclusory allegations—that the Princes "knew and intended" that their donations would be used to support al Qaeda, and that Crown Prince Sultan (as head of the Supreme Council) and

Prince Salman (as head of SHC) did not properly oversee the use of charitable funds. See, *e.g.*, *id.* at 2007-2013.[1]

B. The District Court Decisions

1. On November 14, 2003, Judge Robertson of the District Court for the District of Columbia dismissed the *Burnett* complaint against Crown Prince Sultan as well as Prince Turki al-Faisal bin Abdulaziz al-Saud ("Prince Turki"). The court explained that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1602 *et seq.*, provides "'the sole basis for obtaining jurisdiction over a foreign state in Federal courts.'" *Burnett* v. *Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 14 (D.D.C. 2003) (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)). Under the FSIA, foreign states are presumptively immune from suit unless a specified exception applies. 28 U.S.C. §§1604, 1605. Following circuit precedent, the court construed the Act to encompass suits against individual officers in their official capacity. 292 F. Supp. 2d at 14.

The court rejected the claim that the conduct alleged in the complaint fell within the FSIA's exception for noncommercial torts, 28 U.S.C. §1605(a)(5), for two reasons. First, it held that the connection between the charitable

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[1] Petitioners err in suggesting (at 5) that the charities the Princes allegedly supported were designated terrorist groups when the donations were made. The complaints allege that, *before the attacks*, the Princes donated to the International Islamic Relief Organization ("IIRO"), World Assembly of Muslim Youth, Muslim World League, Sanabel al-Kheer, and al Haramain. See, *e.g.*, C.A. App. 2007-2013. But none of the entities allegedly supported was then designated. See U.S. Dep't of Treasury, *Protecting Charitable Organizations*, http://www.ustreas.gov/offices/enforcement/key-issues/protecting/fto.shtml. A handful of branch offices of al Haramain and IIRO were designated after the attacks, but the complaints do not allege contributions to those offices. See *ibid.* Al Haramain's worldwide organization was not designated until June 2008. *Ibid.*

giving and the 9/11 attacks was so attenuated that it "would stretch the causation requirement of the non-commercial torts exception not only to 'the farthest reaches of the common law,' but perhaps beyond, to *terra incognita*." 292 F. Supp. 2d at 20. Second, the court held that the conduct fell within the "discretionary function" exclusion from the non-commercial torts exception. *Id.* at 20-21 (citing 28 U.S.C. §1605(a)(5)(A)). Under that exclusion, "decisions grounded in social, economic, and political policy" are protected by sovereign immunity even if they would otherwise be considered non-commercial torts. *Id.* at 21. The court found it "nearly self-evident" that deciding "what disbursements should be made to Islamic charitable organizations" consistent with Saudi Arabia's foreign and religious policies falls within that exclusion. *Id.* at 20-21. The court also observed that, while the complaint alleged provision of material support to terrorism, the FSIA exception addressing that type of conduct "does not apply here." *Id.* at 20 n.5 (citing former 28 U.S.C. §1605(a)(7)).[2]

Finally, the district court found that it lacked personal jurisdiction over Crown Prince Sultan, who had also been sued in his individual capacity. Petitioners, the court ruled, had failed to show that Crown Prince Sultan had purposefully directed any conduct at the United States. 292 F. Supp. 2d at 22-23. Consequently, he could not "reasonably anticipate that he might be subject to suit here." *Id.* at 21-23.

2. In December 2003, the Judicial Panel on Multidistrict Litigation transferred *Burnett* to the Southern District of New York for consolidated pretrial proceedings

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[2] At the time the district court ruled, the terrorism exception appeared at 28 U.S.C. §1605(a)(7). That provision was amended in 2008. National Defense Authorization Act, Pub. L. No. 110-181, §1083, 122 Stat. 3, 338 (2008), and now appears at 28 U.S.C. §1605A.

with the actions that had been filed there. C.A. App. 1785-1786. Judge Casey then dismissed the claims against Crown Prince Sultan and Prince Turki for many of the reasons identified by Judge Robertson. Pet. App. 117a-238a. Like Judge Robertson, Judge Casey concluded that FSIA immunity is available to officials acting in their individual official capacities. *Id.* at 137a. Also like Judge Robertson, Judge Casey rejected petitioners' reliance on the non-commercial torts exception. Acting as a factfinder for purposes of determining jurisdiction under the FSIA, the court concluded that petitioners had failed to plead "facts to suggest that the Princes knew they were making contributions to terrorist fronts and provided substantial assistance or encouragement to the terrorists." *Id.* at 161a. The court "reviewed the complaints in their entirety and f[ound] no allegations from which it c[ould] infer that the Princes knew the charities to which they donated were fronts for al Qaeda." *Ibid.* Again like Judge Robertson, Judge Casey concluded that, even if the non-commercial torts exception applied, the conduct fell within the discretionary-function exclusion from that exception. The alleged conduct—coordinating government grants to charities—"involved an element of choice or judgment based on considerations of public policy." *Id.* at 163a.

Finally, like Judge Robertson, Judge Casey found personal jurisdiction lacking. Pet. App. 187a-189a. Petitioners had offered only "conclusory allegations" that fell short of showing that the Princes "purposefully directed [their] activities at this forum by donating to charities that [they] knew at the time supported international terrorism." *Id.* at 187a.

The court later dismissed the claims against Princes Naif and Salman on the same grounds. Pet. App. 54a-116a.

C. Proceedings In The Court Of Appeals

The Second Circuit unanimously affirmed. Pet. App. 1a-47a.

1. The court of appeals first addressed whether an individual official could claim immunity under the FSIA. The Act, by its terms, applies to any "foreign state," including any "agency or instrumentality" of the state. 28 U.S.C. §§1603(a), 1604. Based on the FSIA's text and history, the court concluded that "an individual official of a foreign state acting in his official capacity is the 'agency or instrumentality' of the state and is thereby protected by the FSIA." Pet. App. 14a, 19a. The FSIA, the court explained, was intended to "codify the existing common law principles of sovereign immunity," which "expressly extended immunity to individual officials acting in their official capacity." *Id.* at 18a. And nowhere did Congress "'even hint [at] an intent to exclude individual officials.'" *Ibid.* (quoting *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990)).

The court rejected the argument that only an artificial entity can be an "agency or instrumentality of a foreign state." It observed that "an agency is any thing or person through which action is accomplished." Pet. App. 19a-20a. The term is thus "easily open enough to include senior members of a foreign state's government and secretariat" such as the Princes. *Id.* at 20a.

The court also relied on a recent amendment to the FSIA's terrorism exception, which specifically refers to "official[s], employee[s] or agent[s]" of a foreign state. 28 U.S.C. §1605A(a)(1), (c). The court reasoned that, if individual officers were not covered by the FSIA in the first place, there would be no need to include such language in the exception. Pet. App. 21a-22a.

The court noted that, in other cases, the United States had argued that the immunity of individual officials was

governed by "expansive" common-law principles. Pet. App. 17a-19a. But the court found it unnecessary to address the scope of any common-law immunity: "Because we decide this case on the ground that the FSIA protects individual government representatives in their official capacities, we need not consider any continuing vitality of sovereign immunity under the common law." *Id.* at 18a.

2. The court of appeals also rejected petitioners' argument that the conduct at issue here falls within the FSIA's non-commercial torts exception. Congress, the court explained, specifically addressed the scope of immunity for providing support to terrorists under the terrorism exception, 28 U.S.C. §1605A. Under that more specific provision, foreign states lack immunity for providing "material support" for terrorism, but *only* if the state has been "designated as a state sponsor of terrorism" by the United States before (or as a result of) the act at issue. *Id.* §1605A(a)(1)-(2).

Petitioners acknowledged that their claims concerned the type of conduct governed by that exception—provision of "material support or resources" to terrorists. See, *e.g.*, Fed. Ins. C.A. Br. 6. And they did not dispute that they failed to meet the requirements of the terrorism exception because Saudi Arabia has *not* been designated a state sponsor of terrorism. Pet. App. 31a. Petitioners nonetheless sought to proceed under the more general FSIA exception for non-commercial torts. See *id.* at 26a. The court of appeals found it unnecessary to address whether (as both district courts had determined) the conduct at issue fell within the discretionary function exclusion. See pp. 7-8, *supra*. Instead, the court of appeals interpreted Section 1605A as providing the sole means of avoiding immunity in cases involving material support to terrorism. If parties could proceed under the general non-commercial torts exception despite failing to meet the requirements of Section 1605A, the court of appeals

observed, "[a]n important procedural safeguard—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated." Pet. App. 31a.

3. Finally, the court of appeals upheld the district court's conclusion that it lacked personal jurisdiction over the Princes. Petitioners, it ruled, had not shown that the Princes "engaged in 'intentional, and allegedly tortious, actions * * * expressly aimed' at residents of the United States." Pet. App. 43a (quoting *Calder* v. *Jones*, 465 U.S. 783, 789 (1984)). Petitioners "rel[ied] on a causal chain to argue a concerted action theory of liability: the Princes supported Muslim charities knowing that their money would be diverted to al Qaeda, which then used the money to finance the September 11 attacks." *Id.* at 42a-43a. That attenuated causal chain, the court held, did not establish personal jurisdiction. While "[i]t may be the case that acts of violence against the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda, * * * foreseeability is not the standard for recognizing personal jurisdiction." *Id.* at 44a. "Rather, the plaintiffs must establish that the [Princes] 'expressly aimed' intentional tortious acts at residents of the United States." *Ibid.* (quoting *Calder*, 465 U.S. at 789). The court held that "indirect funding to an organization that was openly hostile to the United States" does not satisfy that standard. *Ibid.*[3]

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[3] The court also concluded that the FSIA's "commercial activities" exception did not apply, and that SHC was an "agency or instrumentality" of Saudi Arabia. Pet. App. 22a-26a, 35a-39a. Those rulings are not at issue here.

REASONS FOR DENYING THE PETITION

I. The Second Circuit's Holding That The FSIA Applies To Individual Officers Acting In Their Official Capacity Does Not Warrant Review

The Second Circuit's conclusion that the FSIA applies to individuals acting in their official capacity is consistent with overwhelming circuit authority. Six circuits agree that the FSIA applies to such suits. Petitioners nevertheless seek review based on a purported conflict with a single Seventh Circuit decision and views expressed by the United States. But the precise meaning and continuing vitality of the Seventh Circuit's decision are far from clear. Any disagreement, moreover, relates only to *which source of law* provides immunity—the FSIA, the common law, or both—not to *whether* individual officials are immune. Whatever academic significance that may have, it has no *practical* significance unless the approaches lead to different results. And on that issue, petitioners utterly fail to meet their burden, both generally and on the facts of this case.

A. The Decision Below Follows Overwhelming Circuit Authority

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. §1604, and defines "foreign state" to "include[] * * * an agency or instrumentality of a foreign state," *id.* §1603(a). The Second Circuit concluded that the term "foreign state" encompasses individual officers acting in their official capacity. Pet. App. 19a. Petitioners concede, as they must, that the Second Circuit's holding accords with decisions of the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits. Pet. 14.

The Fourth Circuit, for example, has squarely held that "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign

state," and that officials are thus immune for their official acts under the FSIA. *Velasco* v. *Gov't of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004). Likewise, the Sixth Circuit has stated that "normally foreign sovereign immunity extends to individuals acting in their official capacities." *Keller* v. *Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002). The Fifth, Ninth, and D.C. Circuits agree. See *Byrd* v. *Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Jungquist* v. *Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997); *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990).

That interpretation makes sense. As the Second Circuit explained, suits against individuals in their official capacity are, in legal contemplation, suits against the state. See Pet. App. 20a-21a. "'It is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly.'" *Chuidian*, 912 F.2d at 1101-1102 (citing *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). Because an individual's official acts are, by definition, acts of the "state," it is perfectly natural to read the FSIA's grant of immunity to "foreign state[s]" as encompassing those official acts. The FSIA, moreover, was designed to codify the common-law sovereign immunity principles that pre-dated its enactment. Pet. App. 18a. Those common-law principles "'expressly extended immunity to individual officials acting in their official capacity.'" *Ibid.* (quoting *Chuidian*, 912 F.2d at 1101).

Finally, as the Second Circuit observed, the FSIA specifically covers "agenc[ies]" of a state, 28 U.S.C. §1603(a), and that term is readily construed to encompass "any thing or person through which action is accomplished," Pet. App. 19a-20a. Moreover, even if an officer were not an "agency," the Act provides that the term "'foreign state' * * * *includes* * * * an agency or instrumentality

of a foreign state." 28 U.S.C. §1603(a) (emphasis added). "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). The statute thus comfortably encompasses suits against individual officers for actions undertaken in their official capacities, consistent with the common law. The consensus among the circuits on that issue disproves any need for this Court's review.[4]

B. There Is No Circuit Conflict Justifying Review

Petitioners' claim of circuit conflict is based almost entirely on a single case—*Enahoro* v. *Abubakar*, 408 F.3d 877 (7th Cir. 2005). Pet. 16. But the purported disagreement with that solitary and ambiguous decision is both unfounded and academic.

1. As an initial matter, *Enahoro*'s holding is far from clear. The plaintiffs in that case sued General Abubakar, a member of a military junta that ruled Nigeria in the 1990s, for torture and wrongful death. 408 F.3d at 879-880. Abubakar claimed immunity under the FSIA. *Id.* at 880. The Seventh Circuit questioned that claim. "If Congress meant to include individuals acting in the official capacity in the scope of the FSIA," the court stated, "it would have done so in clear and unmistakable terms."

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[4] Petitioners rely (at 18) on a statement in the legislative history that "the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives." H.R. Rep. No. 94-1487, at 21 (1976). Diplomatic and consular immunity, however, are distinct from a state's own sovereign immunity. See Restatement (Second) of Foreign Relations Law §§66 cmt. b, 73, 81 (1965). Diplomatic immunity, for example, applies even to a diplomat's *unofficial* acts. See *id.* §81 & cmt. c. That the Foreign *Sovereign Immunities* Act does not address those specialized forms of immunity does not preclude it from addressing the *sovereign* immunity individual officials have for their *official* acts on behalf of the state.

Id. at 881-882. The court, however, went on to observe at length that other cases had applied the FSIA to individual officers, *so long as* the officer was "acting in his official capacity." *Id.* at 882. It noted that *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), "[a] case which is similar to the one before us," rejected an immunity claim because the defendant was "act[ing] on her own authority and not on the authority of the [state]." 408 F.3d at 882. The court then "conclude[d], based on the language of the statute, that the FSIA does not apply to General Abubakar." *Ibid.* The court did not explain whether the dispositive fact was that Abubakar was an individual; that he had acted outside the scope of his official authority; or both.

The briefing in *Enahoro* casts serious doubt on whether that decision rests on the first ground. The plaintiffs did not argue that the FSIA is categorically inapplicable to individual officers. Instead, they contended that "individuals who act[] beyond the scope of their official capacity have no immunity under the FSIA." Enahoro Br. 21, *Enahoro* v. *Abubakar*, No. 03-3089 (7th Cir. Apr. 27, 2004). Indeed, the plaintiffs seemed to concede that the FSIA *could* apply to individuals, stating that, "[u]nder *Chuidian*, foreign officials are entitled to sovereign immunity only when acting in their official capacities." *Id.* at 23. And the defendant pointed out the plaintiffs' "fail[ure] to address the multiple cases * * * which hold that individuals acting in an official capacity on behalf of a foreign sovereign are immune under the FSIA." Abubakar Reply Br. 10, *Enahoro* v. *Abubakar*, No. 03-3089 (7th Cir. June 25, 2004).

The basis for the Seventh Circuit's ruling is thus ambiguous. So too is the decision's continuing vitality. In 2008—years after *Enahoro* was decided—Congress revised the Act's terrorism exception, adding specific references to "official[s], employee[s] or agent[s]" of a for-

eign state. 28 U.S.C. §1605A(a)(1), (c); see p. 7 n.2, *supra*. The Second Circuit relied on those amendments below. If individual officers were not covered by the FSIA, the court explained, there would have been no need to refer to them in the exception. See Pet. App. 21a-22a. That was appropriate: Although "the view of a later Congress does not establish definitively the meaning of an earlier enactment, * * * it does have persuasive value." *Bell* v. *New Jersey*, 461 U.S. 773, 784-785 (1983); see also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). A future panel of the Seventh Circuit thus could conclude that *Enahoro* did not definitely resolve the question at issue here; that its discussion was mere *dictum*; or that the 2008 amendments require a different result. As things now stand, there is no clear conflict warranting this Court's review.

2. Even if *Enahoro* had squarely rejected FSIA immunity for official-capacity suits, its disagreement with the court below would be academic. Before the FSIA's enactment, it was well established that the common law "extended immunity to individual officials acting in their official capacity." *Chuidian*, 912 F.2d at 1101; see Restatement (Second) of Foreign Relations Law §66(f) (1965). Most courts, like the court below, have interpreted the FSIA to codify that common-law immunity. See pp. 12-13, *supra*. But there is no dispute that, if the FSIA did *not* address that issue, the common law would continue to apply. Nothing in the FSIA suggests that Congress *eliminated* sovereign immunity for the official acts of individual officers.

Enahoro is silent on the issue of common-law immunity. The defendant there claimed immunity only under "the FSIA," 408 F.3d at 880, and the court held only that "the FSIA" did not provide immunity, *id.* at 882. As the United States has noted, "[t]he court was not presented with, and thus had no occasion to consider, * * * immu-

nity * * * rooted in common law." Pet. App. 270a-271a n.9. Moreover, there is every reason to believe that the Seventh Circuit would recognize such immunity. In *Ye* v. *Zemin*, 383 F.3d 620 (7th Cir. 2004), the court held that "the FSIA does not apply to heads of states," but accorded common-law head-of-state immunity nonetheless. *Id.* at 625. There is no reason to expect the court to take a different approach to immunity for individual officers sued in their official capacity.

Thus, even if one were to read *Enahoro* as disagreeing about whether *the FSIA* provides immunity, that disagreement would at most amount to a dispute over the *source* of individual-officer immunity—the FSIA, the common law, or both. See Pet. App. 18a (finding immunity under the FSIA while reserving judgment on the availability of "sovereign immunity under the common law"). There still would be no dispute over *whether* immunity is available for official acts—the only issue with practical significance.

3. Petitioners also half-heartedly claim that the decision below is in "considerable tension" with decisions of the Tenth and Eleventh Circuits in a "related context." Pet. 14, 16-17. But those cases address only whether the FSIA applies to *criminal* acts. See *Southway* v. *Cent. Bank of Nigeria*, 198 F.3d 1210, 1214 n.4 (10th Cir. 1999); *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). That context is "related" only in the sense that it involves the same statute. Petitioners also claim another "source of tension" in decisions granting head-of-state immunity. Pet. 19-20. But the Second Circuit did not reject *any* form of common-law immunity, Pet. App. 18a, much less head-of-state immunity, cf. p. 14 n.4, *supra*. That petitioners claim conflicts with such obviously inapposite decisions underscores the absence of any genuine need for review.

C. The United States' Position Does Not Justify Review

Petitioners also rely on a purported conflict with the views of the United States. They again fail to show a disagreement of any practical significance.

1. Petitioners claim that, in the United States' view, "it is of 'critical importance' that FSIA §1603 not be construed to include foreign officials [because] such a construction would potentially 'bring U.S. sovereign immunity law into conflict with customary international law.'" Pet. 18 (quoting Pet. App. 278a, 282a). Petitioners misstate the United States' position.

The question of "critical importance" that the United States referenced was whether "the FSIA *eliminated* immunity for individual foreign officials" altogether. Pet. App. 278a-283a (emphasis added). That question is not implicated here. *No* party to this case suggests that foreign officials are entitled to no immunity at all. The Second Circuit held that the FSIA provides immunity, and left open the possibility that the common law provides immunity as well. See *id.* at 18a. Petitioners argue that the FSIA does not apply, but do not dispute that common-law immunity is available in some cases. Cf. Pet. 19 n.7. And no circuit court has ever held that the FSIA eliminated immunity for individual officers entirely. Petitioners' central claim of "critical importance" is thus a self-created spectre.

The United States has persuasively explained why the FSIA did not eliminate individual-officer immunity. "Given that Congress expressly sought to preserve pre-existing immunity rules for foreign states, it would be incongruous to believe that Congress simultaneously abrogated the long standing immunity of individual foreign officials." Pet. App. 269a. The United States has invoked the same decisions the Second Circuit relied on here, not-

ing that "numerous circuit courts have continued to recognize the existence of immunity for individual foreign officials with respect to their official acts." *Id.* at 270a (citing *Velasco*, *Keller*, *Byrd*, and *Chuidian*). And it has opined that "the rationale for the immunity recognized in these cases has * * * been cogently identified." *Id.* at 272a. "[U]nless sovereign immunity extends to individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA." *Id.* at 271a. By granting individual officers immunity, the decision below fully respects those principles.

2. To the extent there is any tension between the decision below and the United States' position, it is over *what source of law* provides immunity to individual officers. The United States relies on the common law, see Pet. App. 260a, 286a-288a, while the court below relied on the FSIA—a statute designed to codify the common law, see *id.* at 16a, 18a. Mere disagreement about the *source* of immunity, however, has no practical significance.

To the extent the United States perceives some difference in scope between common-law and FSIA immunity, it argues that common-law immunity is *broader* than FSIA immunity. It claims, for example, that common-law immunity is not subject to the FSIA's exceptions for commercial activities and the like. See Pet. App. 255a, 275a, 295a-296a; see also *id.* at 276a-277a, 296a-297a (other differences). Those differences cannot justify review here because the Second Circuit's opinion nowhere precludes individual officers from invoking the broader common-law immunity the government advocates. Notwithstanding petitioners' assertion that the Second Circuit "d[id] not recognize any continuing role for common law immunity," Pet. 19, the Second Circuit expressly left that issue open: "Because we decide this case on the ground that the FSIA protects individual government representatives in their official capacities, we *need not*

consider any continuing vitality of sovereign immunity under the common law." Pet. App. 18a (emphasis added). Thus, individual officials remain free to claim common-law immunity in the Second Circuit in all the circumstances the United States deems appropriate.

3. Petitioners nonetheless suggest that the Second Circuit's holding is "'rife with potential to disturb foreign relations'" because it subjects immunity decisions to a "rigid statutory regime" rather than "the common-law regime under which the State Department weighs foreign policy considerations in determining whether to waive immunity in a given case." Pet. 18 (quoting Pet. App. 286a-288a, 297a). Once again, petitioners misstate the United States' position. The United States did observe that common-law immunity entails deference to the Executive's case-specific recommendations. Pet. App. 286a-288a. But the reference to decisions "'rife with potential to disturb foreign relations'" relates to a different point—that FSIA immunity is potentially too *narrow*. *Id.* at 296a-297a. Nowhere did the United States suggest that not being able to recommend *denial* of immunity where the FSIA would otherwise provide it somehow threatens to "disturb foreign relations."

Nor would such a suggestion make sense. No foreign state would object to being granted *too much* immunity. And because the Second Circuit's opinion does not address common-law immunity, the United States remains free to urge that common-law immunity should be granted even when FSIA immunity is not available. Pet. App. 18a. That is hardly a prospect "'rife with potential to disturb foreign relations.'" Pet. 18.

Nor is there any real likelihood that the United States would recommend denial of immunity where the FSIA grants it. Discretionary foreign-policy factors have rarely played a role in the State Department's recommendations and have, in any event, uniformly *favored* immunity.

The State Department's compendium of recommendations from 1952 to 1977 concludes that, "[f]or the most part, diplomatic influences were resisted." *Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977* (M. Sandler, D. Vagts, & B. Ristau, eds.), in 1977 Dig. U.S. Prac. Int'l L. 1017, 1021 ("*Sovereign Immunity Decisions*"). In the "relatively infrequent" cases where such considerations played a role, *id.* at 1018, they resulted in more *expansive* immunity. See *id.* at 1044 (No. 32), 1049 (No. 41), 1068-1069 (No. 69), 1073 (No. 86); see also *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) ("On occasion, political considerations led to suggestions of immunity *in cases where immunity would not have been available* under the restrictive theory." (emphasis added)). And the few cases involving individual-officer immunity show no indication that diplomatic factors played any role. See, *e.g.*, *Sovereign Immunity Decisions* 1037 (No. 19), 1075-1076 (No. 96), 1076 (No. 97).[5] As a result, any disagreement over the scope of immunity under the FSIA—absent a concomitant disagreement over the availability of common-law immunity—lacks practical significance.

4. Even if the Second Circuit's opinion had suggested that the FSIA is the *exclusive* source of immunity for individual officers—and it did not—any disagreement with the United States still would not present a recurring and important issue. For 12 years after the FSIA's enactment in 1976, "courts appear[ed] not to have had occasion to address" whether individual officers were immune. Pet. App. 249a. When the Ninth Circuit decided *Chuidian* in 1990, it was "the first circuit court to consider whether the statute had any application to individ-

[5] The United States, moreover, did not—and does not—express a view in every case. See Pet. App. 287a. Thus, case-specific discretion is often irrelevant.

ual officials." *Id.* at 253a. Although the United States questions the Ninth Circuit's reasoning, it agrees that "*Chuidian*'s result was correct." *Id.* at 273a. Following *Chuidian*, the United States "[did] not file[] any brief revisiting the source of foreign official immunity" until it raised the issue in a statement of interest 16 years later. *Id.* at 272a n.11.[6] And in that case too, the United States disagreed only with the reasoning of the district court, not its result. *Id.* at 285a.

That absence of any real dispute over results is understandable. Because the FSIA "largely codif[ied] the existing common law of sovereign immunity," *Chuidian*, 912 F.2d at 1100, FSIA and common-law immunity substantially overlap. In most cases, therefore, the result is the same under either approach. The United States acknowledges that its common-law approach produces results "consistent with the results reached in the accumulated post-FSIA case law on point." Pet. App. 277a. For that reason, any disagreement between the case below and the United States' position is academic and unworthy of further review.

D. This Case Is A Poor Vehicle

Finally, even if there were some hypothetical set of facts in which the Second Circuit, the Seventh Circuit, and the United States would reach divergent results, this case would be an unsuitable vehicle for review. Whether immunity is grounded in the FSIA or the common law, one thing is certain here: The Princes are entitled to immunity. Petitioners concede that, if this Court were to reverse, the courts below could consider common-law

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[6] In *Enahoro*, for example, the United States filed an *amicus* brief that did not discuss sovereign immunity, arguing instead that the Alien Tort Statute did not supply a cause of action. U.S. Br. as *Amicus Curiae* 3-7, *Enahoro* v. *Abubakar*, No. 03-3089 (7th Cir. Feb. 20, 2004).

immunity on remand. Pet. 19 n.7. And there is no reason to believe that common-law immunity would be denied.

To the contrary, under the United States' approach, common-law immunity is a bright-line rule: Individual foreign officers "hold immunity from suit with respect to their official acts." Pet. App. 260a. Thus, the only relevant question is "whether the acts in question were performed on the state's behalf * * * as opposed to constituting private conduct." U.S. Statement of Interest at 24, *Matar* v. *Dichter*, No. 05 Civ. 10270 (S.D.N.Y. filed Nov. 17, 2006); see also *id.* at 26 (actions "clearly undertaken in [the officer's] official capacity * * * cannot form the basis for a suit").[7] Once that threshold is met, immunity attaches—without regard to any FSIA exceptions. See Pet. App. 275a-276a. Because the United States considers common-law immunity to be broader than FSIA immunity, the Second Circuit's conclusion that the Princes are entitled to FSIA immunity forecloses any argument that they would be denied immunity under the United States' approach.

Petitioners nonetheless speculate that the State Department might "waive" the Princes' common-law immunity. Pet. 19 n.7. But they identify no case in which the Executive has ever recommended that immunity be *denied* even though general principles of law dictate that it be granted. As explained above, the State Department relies on case-specific diplomatic factors only rarely, and then only to *grant* immunity, not deny it. See pp. 20-21, *supra*. Petitioners offer no basis to think the State Department would depart from that settled practice here.

Diplomatic factors, moreover, could only support immunity here. The United States views Saudi Arabia as "an important partner in the campaign against terror-

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[7] Petitioners' excerpts from the *Dichter* statement of interest, Pet. App. 258a-283a, do not include the quoted passages.

ism," U.S. Dep't of State, *Background Note: Saudi Arabia* (Feb. 2008), http://www.state.gov/r/pa/ei/bgn/3584.htm, and has lauded the "strong, continuing efforts of the Saudi government in fighting that threat," *President Discusses Progress in Afghanistan, Iraq* (July 1, 2003), http://www.whitehouse.gov/news/releases/2003/07/20030701-9.html; see also *Press Briefing on the President's Visit with the Crown Prince of Saudi Arabia* (Apr. 25, 2005), http://www.whitehouse.gov/news/releases/2005/04/20050425-9.html (war on terror is "an area where the United States and Saudi Arabia have worked very closely together and where the two leaders share a common strategy"). Even before 9/11, Saudi Arabia's and the Princes' support for U.S. efforts had caused bin Laden to declare war on them. See pp. 4-5, *supra*; see also 9/11 Report, *supra*, at 373 ("Saudi Arabia is now locked in mortal combat with al Qaeda."). The notion that the State Department would single out high-ranking officials of a key ally for arbitrary exclusion from the common-law immunity principles it applies in other cases is implausible in the extreme.

Moreover, granting review where, as here, dismissal is inevitable would undermine the fundamental purposes of sovereign immunity. Sovereign immunity is "immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation." *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000); cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-527 (1985). Petitioners have already subjected the Princes to years of baseless litigation in derogation of that principle. This Court should not further prolong the proceedings based on an academic debate over the source of immunity when the result in this case is clear under any approach.

II. The Second Circuit's Holding That Terrorism Claims Cannot Be Brought Under The FSIA's Torts Exception Does Not Warrant Review

Petitioners also seek review of the Second Circuit's conclusion that they cannot circumvent the requirements of the FSIA's terrorism exception by invoking the non-commercial torts exception instead. But that ruling implicates no circuit conflict and does not warrant review.

A. There Is No Circuit Conflict

Petitioners describe their complaint as seeking damages for "provid[ing] material support to terrorist organizations." Pet. 1-2. That, of course, is precisely the conduct that the FSIA's terrorism exception addresses—the "provision of material support or resources" to terrorist acts. 28 U.S.C. §1605A(a)(1). Petitioners, however, cannot satisfy that exception. The terrorism exception requires that the defendant be designated a state sponsor of terrorism. *Id.* §1605A(a)(2)(A)(i). Saudi Arabia has not been so designated. See Pet. App. 31a; U.S. Dep't of State, *State Sponsors of Terrorism*, http://www.state.gov/s/ct/c14151.htm.

Petitioners attempt to avoid that limitation by invoking the general torts exception. The Second Circuit correctly rejected that end-run. If that tactic were permitted, the court noted, "[a]n important procedural safeguard—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated." Pet. App. 31a. Other courts have likewise "repeatedly rejected efforts to shoehorn a claim properly brought under one exception into another." *Id.* at 32a (citing Second, Fifth, and Ninth Circuit cases).

Petitioners insist (at 22) that the decision below conflicts with *Liu* v. *Republic of China*, 892 F.2d 1419 (9th Cir. 1989). In *Liu*, the plaintiff alleged that foreign officials had conspired to murder her husband, and the Ninth

Circuit allowed the suit to proceed under the FSIA's torts exception. *Id.* at 1421, 1424-1426. The court did not consider the argument that the terrorism exception precluded jurisdiction. That exception did not even exist at the time. And, apart from one stray reference in an unrelated portion of the opinion, *id.* at 1433, the court did not even use the word "terrorism." Although petitioners now claim "[t]here can be no doubt that extrajudicial killing is an act of terrorism," Pet. 22 n.9, that is their characterization, not the court's. Because the Ninth Circuit did not consider (and could not have considered) the argument on which the Second Circuit relied, the claim of conflict is unfounded.

Petitioners similarly err in claiming (at 23-24) that the decision below is contrary to *Price* v. *Socialist Peoples' Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). In *Price*, two Americans sued Libya for gross mistreatment during their incarceration there. *Id.* at 86. They relied *solely* on the FSIA's terrorism exception, which the court held inapplicable. *Id.* at 85, 91-95. Except for one brief reference in background discussion, *id.* at 87, the court did not even mention the non-commercial torts exception, let alone address its interaction with the terrorism exception.

The only case that even arguably conflicts with the decision below is a single district court decision, *Doe* v. *Bin Laden*, 580 F. Supp. 2d 93, 96-98 (D.D.C. 2008). But that case is on appeal, see No. 08-7117 (D.C. Cir. docketed Oct. 29, 2008), and the existence of a solitary contrary district court decision is no basis for review in this Court.

B. This Case Is Not An Appropriate Vehicle

In any event, petitioners' suit would fail even under the FSIA's torts exception. That exception expressly excludes "any claim based upon the exercise or performance or the failure to exercise or perform a *discretionary*

function regardless of whether the discretion be abused." 28 U.S.C. §1605(a)(5)(A) (emphasis added). As both district courts held below, that exclusion plainly encompasses the governmental support for charities at the heart of the complaints here: "[D]eciding what disbursements should be made to Islamic charitable organizations" is precisely the sort of "'decision[] grounded in social, economic, and political policy'" that the discretionary-function exclusion covers. *Burnett* v. *Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 20-21 (D.D.C. 2003) (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814 (1984)); Pet. App. 73a-75a, 162a-165a; pp. 7-8, *supra*.[8]

Because petitioners' claims would fare no better under the torts exception, this is not a suitable vehicle for review. Moreover, as explained above, see p. 24, *supra*, sovereign immunity is meant to spare defendants from the burdens of litigation, not merely potential liability. Further protracting this litigation against high-ranking Saudi officials despite the inevitability of dismissal would undermine that important purpose.

III. The Second Circuit's Personal Jurisdiction Holding Does Not Warrant Review

The Second Circuit's ruling on personal jurisdiction represents a straightforward application of settled principles to the particular facts of this case. Petitioners' unfounded assertions of conflict provide no basis for review.

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[8] The torts exception also requires that "*both* the tort *and* the injury * * * occur in the United States." *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984) (emphasis added). Here, the alleged tort—making charitable contributions that indirectly funded al Qaeda—occurred overseas.

A. The Court Of Appeals' Decision Does Not Conflict With This Court's Cases

Petitioners rested personal jurisdiction on their claim that "the Princes supported Muslim charities knowing that their money would be diverted to al Qaeda, which then used the money to finance the September 11 attacks." Pet. App. 42a-43a. The court of appeals found that attenuated causal chain insufficient. Quoting *Calder* v. *Jones*, 465 U.S. 783, 789 (1984), it held that petitioners had to show that the Princes "engaged in 'intentional, and allegedly tortious, actions * * * expressly aimed' at residents of the United States." Pet. App. 43a. That standard, the court held, was not met here. Although "[i]t may be the case that acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda," petitioners had not shown that the Princes "'expressly aimed' intentional tortious acts" here. *Id.* at 44a (quoting *Calder*, 465 U.S. at 789). "Providing indirect funding to an organization that was openly hostile to the United States does not constitute this type of intentional conduct." *Ibid.*

Nothing in that analysis conflicts with this Court's precedents. Petitioners cite cases such as *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), and *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), for the proposition that it would not be "unfair or unforeseeable that the princes would face court proceedings in this country when al Qaeda did precisely what it committed to do with the prince's money." Pet. 27-28. As those cases explain, however, "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction." *World-Wide Volkswagen*, 444 U.S. at 295; see also *Asahi Metal Indus. Co.* v. *Superior Ct. of Cal.*, 480 U.S. 102, 112-113 (1987) (plurality opinion). And actions directed only at a foreign intermediary are not enough—there must be "ac-

tions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475.

Petitioners caricature the Second Circuit's decision as erecting a categorical "bar on jurisdiction based on a defendant's provision of material support to terrorism directed at the forum." Pet. 27. But the Second Circuit held no such thing. The complaints do not allege that the Princes supported al Qaeda in order to finance an attack on the United States—only that they made donations to charitable organizations, knowing that the charities would divert funds to al Qaeda, an organization that was hostile to the United States. See Pet. App. 42a-44a. That causal chain, the court held, was "far too attenuated." *Id.* at 44a.

At bottom, petitioners disagree with the court's application of this Court's precedents to the facts of this case. But a mere claim of "misapplication of a properly stated rule of law" is not grounds for certiorari. Sup. Ct. R. 10. Yet that is all petitioners offer.

B. There Is No Circuit Conflict

Attempting to obscure the factbound nature of their claims, petitioners try to manufacture a circuit conflict. But the different results in the cited cases reflect different facts—not different views of the law.

For example, *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200 (7th Cir. 1997), cited Pet. 28, involved manufacturers from Illinois and California. 132 F.3d at 1202. After the Illinois company rebuffed overtures at a licensing agreement, the California company "responded by threatening [the Illinois company's] customers," leading one New Jersey customer to stop purchasing. *Ibid.* The court found jurisdiction in Illinois because the defendant had "induc[ed] the customers of an Illinois firm to drop their orders." *Id.* at 1203. That case is clearly distinguishable

because, unlike the Princes, the defendant there "engaged in 'intentional, and allegedly tortious, actions * * * expressly aimed'" at a forum resident. Pet. App. 44a (quoting *Calder*, 465 U.S. at 789).

In *Panavision International, L.P.* v. *Toeppen*, 141 F.3d 1316 (9th Cir. 1998), cited Pet. 28-29, an Illinois resident registered a California corporation's trademark as an Internet domain name and then demanded $13,000 from the California corporation for it. See 141 F.3d at 1317-1319. The Ninth Circuit found jurisdiction in California because the defendant had "directed his activity toward the forum state" by "engag[ing] in a scheme to register Panavision's trademarks as his domain names for the purpose of extorting money from Panavision." *Id.* at 1322. The Princes, by contrast, did not "direct[]" any "activity" toward the United States.

Petitioners cite stray remarks in *Janmark* and *Panavision* to suggest that an "effect" on the forum state *alone* can support jurisdiction. See Pet. 28 (quoting 132 F.3d at 1202 and 141 F.3d at 1321). But those isolated statements are not holdings. And it obviously is not the law that a mere effect on the forum state establishes jurisdiction. See pp. 28-29, *supra*. Petitioners do not contend otherwise, see Pet. 26-28, so it is hard to see why they think those isolated comments justify review.

Petitioners' remaining cases are all readily distinguishable because, as the Second Circuit explained, they involved "primary participants in terrorist acts." Pet. App. 41a-42a. The defendants in *Mwani* v. *Bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), for example, were al Qaeda and Osama bin Laden himself. *Id.* at 12. The court found personal jurisdiction because the defendants had "'engaged in unabashedly malignant actions directed at [and] felt in this forum'" by "orchestrat[ing] the bombing of the American embassy in Nairobi" and engaging in an "ongoing conspiracy to attack the United States, with

overt acts occurring within this country's borders." *Id.* at 13. Petitioners' district court cases (at 29-30) are similarly inapposite. See, *e.g.*, *Morris* v. *Khadr*, 415 F. Supp. 2d 1323, 1327, 1336 (D. Utah 2006) (defendant held "several high-ranking al Qaeda positions," "provided substantial financial support and personnel assistance to help the group achieve its international terrorism objectives," and "actively participated in and helped plan al Qaeda's terrorist agenda").[9]

C. The Court Of Appeals' Decision Will Not Hamper Anti-Terrorism Efforts

Finally, petitioners implausibly suggest that the decision below will "undermine a broad range of counterterrorism measures" by "sharply limit[ing] the scope and enforceability of * * * criminal and civil statutes designed to address financial and other support provided to terrorist organizations." Pet. 31-32. The Second Circuit's fact-

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[9] To the extent petitioners invoke the recent decision in *Boim* v. *Holy Land Foundation for Relief & Development*, No. 05-1815, 2008 WL 5071758 (7th Cir. Dec. 3, 2008) (en banc), in reply, their reliance would be misplaced. That en banc decision—which dealt with liability under 18 U.S.C. §2333 (inapplicable to the Princes by virtue of 18 U.S.C. §2337)—does not address personal jurisdiction. The appellants there, moreover, all had significant and direct contacts with the United States: One was a naturalized citizen; two were U.S. corporations; and the fourth was merely an alter-ego or alternative name for one of the other corporations. *Boim* v. *Holy Land Found. for Relief & Dev.*, 511 F.3d 707, 713 (7th Cir. 2007). In any event, *Boim* recognizes that, where the defendant does not know or recklessly disregard that the donations will be channeled to terrorism, the defendant "is not liable." 2008 WL 5071758, at *15. Here, the district court sat as the factfinder for jurisdictional purposes, *Filetech S.A.* v. *France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998); cf. *Duke Power Co.* v. *Carolina Envtl. Study Group*, 438 U.S. 59, 77 (1978), and it found no basis for "infer[ring] that the Princes knew the charities to which they donated were fronts for al Qaeda." Pet. App. 161a; see pp. 2-3, *supra*. Petitioners' claims thus would fail under *Boim*.

bound ruling will have no such effect. The court held only that personal jurisdiction could not be based on an allegation that a defendant contributed to a foreign charity, knowing that the charity would divert funds to a terrorist group that was hostile to the United States. Pet. App. 42a-44a. Nothing in that holding addresses the provision of direct support to *terrorist organizations themselves*, or to intermediary organizations *for the purpose* of funding terrorist attacks on the United States. Here, moreover, the district court found that the allegations of the complaints were insufficient to support a finding that the Princes had the requisite knowledge. See p. 31 n.9, *supra*. And speculation that the Second Circuit's decision might impair the enforcement of other civil and criminal statutes that the Second Circuit's opinion does not address (on potentially different facts) is no basis for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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